

IN THE  
MISSOURI SUPREME COURT

STATE EX REL. RONNIE	)	
LUSK,	)	
	)	Cause No. SC93541
Relator,	)	
	)	
vs.	)	
	)	
THE HONORABLE MARK	)	
ORR, CIRCUIT JUDGE, 38 <sup>TH</sup>	)	
JUDICIAL CIRCUIT,	)	
	)	
Respondent.	)	
	)	
	)	

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ORIGINAL PETITION FOR WRIT OF PROHIBITION IN THE MISSOURI SUPREME  
COURT FROM THE CIRCUIT COURT OF TANEY COUNTY,  
MISSOURI  
THE HONORABLE MARK ORR, CIRCUIT JUDGE

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RELATOR'S STATEMENT, BRIEF, AND ARGUMENT IN SUPPORT OF HIS  
PERMANENT WRIT OF PROHIBITION

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### **JURISDICTIONAL STATEMENT**

The action is one involving Relator's request for an original writ of prohibition, staying proceedings in the underlying cause, *State v. Ronnie Lusk*, Case No. 07N9-CR02026-01, Circuit Court of Taney County, on the grounds that Respondent does not have the authority to revoke Relator's probation since his probation has expired and neither Respondent or the State made every reasonable effort to hold a probation violation hearing before Relator's probation expired. Therefore, jurisdiction lies with this Court pursuant to Missouri Supreme Court Rules 84.22 and 97.01.

No petition for the relief requested has been made to any higher court.

Relief was sought from, and denied by, the Missouri Court of Appeals, Southern District, in Case No. SD32787, on July 8, 2013.

## **STATEMENT OF FACTS**

Relator was placed on probation for five years on February 14, 2008. (Exhibit B, p. A6) Respondent immediately entered an order purporting to suspend Relator's probation until he was to be "released from DOC." (Exhibit B, p. A8) On July 9, 2013, Respondent entered an order purporting to reinstate Relator's probation. (Exhibit A, p. A8) Relator has been violated on a few occasions but has always been continued on probation. (Exhibit B, pp. A8-A12) Respondent has never extended Relator's probation. (Exhibit B, pp. A8-A12) On March 18, 2011, Relator was transported to the Missouri Department of Corrections (DOC) on Case 08SD-CR02244-01. (See Exhibit A, p. A2) On March 24, 2011, the Court issued a warrant and on April 14, 2011 the State filed a motion to revoke probation and to toll the probation period. (Exhibit B, p. A11) On January 30, 2012, Respondent received a letter from Relator, who was in DOC at the time on another case, asking to have the warrant lifted. (Exhibit D, p. A19-A20) On November 26, 2012, DOC alerted Taney County of relator's imminent release and was told that Taney County would not come to pick him up but would pick him up at his probation officer's office when he reported. (Exhibit A, p. A2) Relator was released on November 30, 2012. (See Exhibit A, p. A3) On December 3, 2012, Relator reported to his probation officer but was not taken into custody. (Exhibit F, p. A29) On March 31, 2013, Relator was arrested by the New Madrid Police Department. (Exhibit F, p. A29) On April 18, 2013, the warrant from Taney County was served on Relator. (Exhibit B, p. A11) On June 10, 2013, Relator, through counsel, filed a motion asking Respondent to

discharge Relator from probation. (Exhibit E, pp. A21-A26)<sup>1</sup> On June 12, a hearing on the motion to discharge Relator from probation was held and Respondent denied Relator's motion. (Exhibit B, p. A12; Exhibit C, pp. A13-A18)

A probation violation hearing was set for June 26, 2013 but was reset to July 11. (Exhibit B, p. A12) On July 5<sup>th</sup>, 2013, Relator filed a petition for a writ of prohibition or, in the alternative, writ of mandamus, with the Missouri Court of Appeals, Southern District, which the Court denied on July 9<sup>th</sup>, 2013. (Exhibit G, p. A31) On July 9, 2013, Relator petitioned this Court for a writ of prohibition or, in the alternative, writ of mandamus, which this Court sustained on July 11, 2013. Relator is currently incarcerated in the Taney County Jail.

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<sup>1</sup> In the motion, the DOC face sheet is referred to as Exhibit A. Since the DOC face sheet is included in this brief as Exhibit A, it is not included with the motion. The probation report referred to in the motion is included as Exhibit F and also is not included with the motion.

**POINT RELIED ON**

**Relator is entitled to a writ of prohibition prohibiting Respondent, the Honorable Mark Orr, from revoking Relator's probation, because Respondent does not have the authority to revoke his probation, in that Relator's probation has expired since: (1) It was imposed on February 14, 2008; (2) Respondent has not extended it pursuant to section 559.016 RSMo; and, (3) Respondent has not suspended it pursuant to section 559.036 RSMo; and neither Respondent nor the State made every reasonable effort to conduct a probation violation hearing and revoke Relator's probation before it expired as required by section 559.036 RSMo.**

***Starry v. State*, 318 S.W.3d 780 (Mo. App. W.D. 2010)**

***State v. Acevedo*, 339 S.W.3d 612 (Mo. App. S.D. 2011)**

***State ex rel. Breeding v. Seay*, 244 S.W.3d 791 (Mo. App. S.D. 2008)**

***State ex rel. Whittenhal v. Conklin*, 294 S.W.3d 106 (Mo. App. S.D. 2009)**

***Section 559.036 RSMo. (Supp. 2012)***

**POINT RELIED ON**

**Relator is entitled to a writ of prohibition prohibiting Respondent, the Honorable Mark Orr, from revoking Relator's probation, because Respondent does not have the authority to revoke his probation, in that Relator's probation has expired since: (1) It was imposed on February 14, 2008; (2) Respondent has not extended it pursuant to section 559.016 RSMo; and, (3) Respondent has not suspended it pursuant to section 559.036 RSMo; and neither Respondent nor the State made every reasonable effort to conduct a probation violation hearing and revoke Relator's probation before it expired as required by section 559.036 RSMo.**

“The extraordinary remedy of a writ of prohibition is appropriate in one of three circumstances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy [an] excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court's order.” *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 561 (Mo. banc 2012)(Citation omitted). A Writ of Prohibition is also appropriate to determine whether a trial judge has abused his discretion. *State ex rel. Kinder v. McShane*, 87 S.W.3d 256, 257-258 (Mo. banc 2002). This Court “issued a preliminary writ of prohibition to determine whether the trial judge abused her discretion in refusing to accept Adrian Kinder’s attempted waiver of a potentially serious conflict of interest.” *Id.*

In this case, a writ of prohibition is appropriate because Respondent has no authority in Relator’s case since his probation has already expired since it was not



extended pursuant section 559.016 or section 559.036.<sup>2</sup> While Relator does have the option of seeking relief in a 24.035 motion, the Missouri Court of Appeals, Southern District, has specifically held that a writ of prohibition is an appropriate remedy in cases where the trial court exceeds its statutory authority by holding a probation violation hearing and revoking a relator's probation. *State ex rel. Whittenhall v. Conklin*, 294 S.W.3d 106, 109 (Mo. App. S.D. 2009). Further, if this Court does not grant relief, Relator will suffer considerable harm since he is likely to be revoked and sent to DOC until his 24.035 motion can be considered.

**RESPONDENT'S SUSPENDING RELATOR'S PROBATION DOES NOT  
EXTEND THE PERIOD OF RELATOR'S PROBATION**

An argument that Relator anticipates Respondent will attempt to make is that he suspended Relator's probation right after he was sentenced on February, 18, 2008, until after he was released from DOC seven months later on July 9, 2008. Therefore, Relator's probation did not expire until July 9, 2013. The docket sheet does indeed show that Respondent entered an order that purportedly suspended Relator's probation right after he sentenced him on February 14, 2008 and reinstated it on July 9, 2008. (Exhibit B, p. A8) This argument fails for two reasons.

First, suspending the probation does not extend the length of time a defendant can be on probation. The argument that a trial Court can suspended a person's probation and extend the period of time he is on probation was rejected by the Missouri Court of Appeals, Eastern District, in *Jordan v. Flynn*, 903 S.W.2d 261, 262 (Mo. App. E.D.

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<sup>2</sup> All statutory references, unless otherwise stated, are from RSMo Supp. 2012.

1995). It is true that the legislature amended section 559.036 in 2005 and added the following section:

The prosecuting or circuit attorney may file a motion to revoke probation or at any time during the term of probation, the court may issue a notice to the probationer to appear to answer a charge of a violation, and the court may issue a warrant of arrest for the violation. Such notice shall be personally served upon the probationer. The warrant shall authorize the return of the probationer to the custody of the court or to any suitable detention facility designated by the court. Upon the filing of the prosecutor's or circuit attorney's motion or on the court's own motion, the court may immediately enter an order suspending the period of probation and may order a warrant for the defendant's arrest. The probation shall remain suspended until the court rules on the prosecutor's or circuit attorney's motion, or until the court otherwise orders the probation reinstated.

Section 559.036.7. Despite this additional language, however, the Missouri Court of Appeals, Southern District, in *State ex rel. Breeding v. Seay*, 244 S.W.3d 791 (Mo. App. S.D. 2008), while acknowledging the language in section 559.036.7, still held that every effort must be made to have the probation violation hearing before the probation expires. *Id.* at 795-796.

Assuming, *arguendo*, this Court holds that suspending a person's probation can extend the period of his probation, this does not help Respondent. A trial Court's authority to place a person on probation comes from the legislature and rules promulgated by this Court. *State ex rel. Popovich v. Conley*, 967 S.W.2d 294, 296 (Mo. App. W. D. 1998) It follows then the parameters a trial Court has regarding probation also come directly from the legislature or the Supreme Court rules. Further, in construing the language used in a statute, Courts "examine the language used in the statute according to its plain and ordinary meaning." *State v. Acevedo*, 339 S.W.3d 612, 617 (Mo. App. S.D. 2011). Courts "look to whether the language is clear and plain to a person of ordinary intelligence." *Id.* If the language used in the statute is clear, Courts "must give effect to the statute as written." *Id.*

The language regarding a Court's authority with probation is clear. Section 559.036.1 specifically states, "[a] term of probation commences on the day it is imposed." *State ex rel. Whittenhall v. Conklin*, 294 S.W.3d 106, 109 (Mo. App. S.D. 2009) The Court imposed probation on February 18, 2008. While Respondent did enter an order purporting to suspend Relator's probation until he was released from DOC, nothing in section 559.036 gives a trial Court to suspend a defendant's probation just because he is in DOC. Section 559.036.7 does authorize the Court the authority to suspend a defendant's probation *if the State or the Court files a motion to revoke*. No such motion had been made on February 14, 2008. Finally, Respondent never extended Relator's probation pursuant to section 559.016. Relator's probation ended on February 14, 2008.

**RESPONDENT'S ISSUING OF CAPIAS WARRANTS WHEN RELATOR HAD  
ALLEGEDLY VIOLATED HIS PROBATION DID NOT EXTEND THE PERIOD  
OF RELATOR'S PROBATION**

A second argument Relator anticipates Respondent will attempt to make is that on a number of occasions, he issued capias warrants for Relator during his term of probation and that these warrants served to toll Relator's probation. Therefore, Relator's probation did not end on February 18, 2013. This argument has been brought up in other cases and has been rejected, most recently by the Missouri Court of Appeals, Western District, in *Starry v. State*, 318 S.W.3d 780, 784-85 (Mo. App. W.D. 2010)(citing to the case *State ex rel. Limback v. Gum*, 895 S.W.2d 663, 665 (Mo. App. W.D. 1995)).

While it is true that this Court is not bound by those decisions, Relator respectfully submits that nothing in section 559.036 RSMo authorizes this and that his argument regarding a court's authority with probation coming from the legislature and his argument on statutory construction, *supra*, apply here as well.

**THE STATE DID NOT MAKE EVERY REASONABLE EFFORT TO CONDUCT  
THE HEARING PRIOR TO THE EXPIRATION OF RELATOR'S PROBATION**

Normally, the circuit Court's jurisdictional authority to revoke probation ends when the probationary period expires. *Stelljes v. State*, 72 S.W. 3d 196 (Mo.App.2002). Section 559.036 RSMo provides the only exception that allows a trial court to extend its

statutory authority and revoke probation after its expiration date. Section 559.036.8 states that:<sup>3</sup>

the power of the court to revoke probation shall extend for the duration of the term of probation designated by the court and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that (1) some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and (2) that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

Section 559.036.8 is “complied with when, prior to the expiration of probation, some manifestation of intent to revoke is established and there is no unreasonable delay in conducting the revocation hearing.” *State ex rel. Whittenhall v. Conklin*, 294 S.W.3d at 110.

While the State has met the first requirement of 559.036.8, there still was an unreasonable delay in conducting the hearing on the alleged violations. A probationer has the right to a “timely and final resolution of his probation.” *Cline v. Teasdale*, 142

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<sup>3</sup> Section 559.036 RSMo has been amended so that what was once subsection 6 is now subsection 8. Thus, many of the cases cited in this petition refer to section 559.036.6 when the present statute is 559.036.8.

S.W.3d 215, 223 (Mo. App W.D. 2004). Further, this Court has previously said that “no unreasonable delay should occur in affording the probationer a hearing.” *State, ex rel. Breeding v. Seay*, 244 S.W.3d at 795 (quoting *State ex rel. Carlton v. Haynes*, 552 S.W.2d 710, 714 (Mo. banc 1977)). Moreover, the Missouri Court of Appeals, Southern District, stressed that Section 559.036.8 requires “every reasonable effort to be made to ... conduct the hearing prior to the expiration of the period of probation.” *State, ex rel. Breeding v. Seay, supra*, at 794.

Relator acknowledges that he bears the burden to show that “the trial court did not make every reasonable effort to conduct the revocation hearing prior to expiration of the period of probation.” *State v. Roark*, 877 S.W.2d 678, 680 (Mo. App. S.D. 1994). Relator respectfully submits that the evidence clearly shows this.

First, relator was in DOC for approximately 20 months after the warrant had been issued. (Exhibit A, pp. A2-A3; Exhibit B, p. A11) The State easily could have contacted the probation officer or DOC itself to confirm that Relator was in fact incarcerated. In fact, Relator, from DOC, had written Respondent a letter asking him to continue Relator on probation. (Exhibit D., pp. A19-A20) This letter was filed with the court on January 30, 2012, more than year before relator’s probation expired. (Exhibit D, p. A19) Respondent or the state could have had Relator transported to Taney County to have a hearing or could have had a hearing via polycom. Further, Taney County definitely knew Relator was incarcerated in DOC on November 26, 2012 and was about to be released. (Exhibit A, p. A2) The State made the choice not to pick him up from DOC. (Exhibit A, p. A2) Moreover, Taney County made no effort to pick him up when he reported to his

probation officer on December 3, 2012 even though it had stated it was going to do just that. (Exhibit A, p. A2; Exhibit F, p. A29) Given that the state and Respondent knew Relator was in DOC and failed to make any effort to transport him to Taney County for a hearing or made any effort to have a hearing via polycom, and, on two separate occasions, the State had the opportunity to apprehend Relator and made the choice not to, any argument by Respondent that the State did make every reasonable effort to conduct the hearing prior to Relator's probation expiring is simply without merit. Respondent's argument that Relator could have filed a motion for disposition of detainers fails for three reasons. (Exhibit C, p. A16) First, the law on disposition of detainers does not apply to probation violation hearings. Second, even if it did, there was no detainer filed in this case. Third, given that neither Respondent nor the state made any effort to pick up Relator upon his release from DOC or at the probation office (which Taney County specifically had stated it would do) it is very unlikely a letter from defendant requesting disposition of his probation violation would have made any difference. Moreover, Respondent's argument fails to acknowledge that it is not Relator's burden to ensure the hearing is timely held.

Finally, Respondent's argument that he could not have had a hearing via polycom on the grounds that he cannot force a defendant to waive his right to be personally present at a probation violation hearing does not have merit because Respondent did not even make the attempt to have the hearing through polycom. (Exhibit C, p. A16)

## CONCLUSION

While a manifestation of intent to revoke was shown, the facts of Relator's case clearly show that not every reasonable effort to conduct a hearing before his probation expired was taken. As such, Respondent is without authority to revoke Relator's probation. Relator respectfully requests this Court make its preliminary writ of prohibition permanent.

Respectfully submitted,

/s/ James Egan

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## CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify, that on this 13th day of August, 2013, true and correct copies of the foregoing brief were emailed to the Hon. Mark Orr, Circuit Judge, 38<sup>th</sup> Judicial Circuit, 110 W. Elm, Room 205, Ozark, Missouri, 65721; Phone 417-581-2727; Fax 417-581-0091; E-Mail: [Mark.Orr@courts.mo.gov](mailto:Mark.Orr@courts.mo.gov); and, Mr. Jeff Merrell at the Taney County Prosecutor's Office, Taney County Judicial Center, 266 Main Street, Forsyth, Missouri 65653; Phone 417-546-7260; Fax 417-546-2376; E-Mail: [JeffM@co.taney.mo.us](mailto:JeffM@co.taney.mo.us).

/s/ James Egan

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James Egan



**CERTIFICATE OF COMPLIANCE**

I, James Egan, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 3000 words, which does not exceed the 31,000 words allowed for a Relator's brief.

/s/ James Egan

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James C. Egan